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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 225

DENNIS WAYNE McDOW,
Petitioner,

versus

LOUISIANA SOUTHERN RAILWAY COMPANY,
Respondent.

ROBERT J. CASEY,
Petitioner,

versus

LOUISIANA SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DART, GUIDRY, PRICE & READ,
LOUIS C. GUIDRY,
Attorneys for Petitioners.

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Dennis Wayne McDow and Robert J. Casey, plaintiffs and appellants, pray for a writ of certiorari to review the

final judgments of the United States Court of Appeals for the Fifth Circuit, entered in the above causes on February 24, 1955 and April 20, 1955, respectively, (R. 52) and (R. 31), rehearings denied April 12, 1955 and May 12, 1955, Respectively, (R. 62) and (R. 35).

OPINIONS.

The opinion of the District Court in the *McDow* case (R. 45) is not reported but it is set out in full at 219 F. 2d 652, and the opinion of the Court of Appeals (R. 52) is reported in 219 F. 2d 650. The opinion of the District Court in the *Casey* case (R. 23) is not reported, nor is that of the Court of Appeals (R. 30).

JURISDICTION.

The judgment of the Court of Appeals was entered in the *McDow* case on February 24, 1955 (R. 52) and in the *Casey* case on April 20, 1955 (R. 31). Petitions for rehearing were seasonably filed, and were denied on April 12, 1955 and May 12, 1955, respectively, (R. 62) and (R. 35). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTION PRESENTED.

Whether the Act of Congress 49 U.S. Code 5(2) (f), and an order of the Interstate Commerce Commission entered pursuant thereto, creates a cause of action against a rail-

road affected thereby, in favor of an employee of such railroad, a party to a transaction covered by the Act.

STATUTE INVOLVED.

The statute involved is 49 U. S. Code, Section 5, regulating the consolidation of common carriers by railroad.

STATEMENT.

Section 5 (2) (f) of the Act of Congress (49 U.S.C. 5 (2) (f), regulating the consolidation of common carriers by railroad provides,

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, ..."

The plaintiffs, Dennis Wayne McDow and Robert J. Casey, were in the employ of the Louisiana Southern Railway Company on January 29, 1953 when, in the matter of

Finance Docket No. 17972, "Louisiana Southern Railway Company Control", the Interstate Commerce Commission authorized the New Orleans & Northeastern Railroad Company to acquire control of Louisiana Southern Railway Company through purchase and ownership of its capital stock pursuant to Section 5(2) of the Interstate Commerce Act, as amended.

By reference to its order in Chicago & N. W. Ry. Co., Merger, 261 I.C.C. 672, the Interstate Commerce Commission provided for the protection of employees of the two carriers as follows:

> "During the period of four (4) years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period following the effective date of such order than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order; 261 I.C.C."

On February 27, 1953, the Louisiana Southern Railway Company notified the plaintiff, McDow, that his services were no longer required and that he would receive no further compensation after the 20th day of February 1953, but that he would receive $600.00 per month for two months. On the same date the plaintiff, Casey, was notified that his services were no longer required and that he would receive no further compensation after the 28th day of February, 1953.

The plaintiffs, in separate suits, sued Louisiana Southern Railway Company in a State Court of Louisiana, which suits were removed by the defendant, Louisiana Southern Railway Company, to the United States District Court, Southern District of Louisiana, at New Orleans.

In the *McDow* case the District Court gave as its sole written reason for granting the defendants' motion for a summary judgment:

"REASONS:

> "This case turns on the definition of the word "employee". Nowhere in the Interstate Commerce Act is employee defined. Consequently, its meaning in ordinary every day usage must be accepted, unless the legislative history of Section 5(2) (f) of the Act would indicate otherwise. A study of the legislative history of that section leaves no doubt that the term "employee" as used therein does not include the vice-president and general manager of a railroad. Hearings before Committee on Interstate Commerce on Transportation Act of 1940, S. 2009, 76th Cong. 1st Sess. 34 (1939) at page 34, Hearings before Committee on Interstate and Foreign Commerce on H.R. 2531 and 4862, 76th Congress, 1st Sess. (1930) at pages 193, 216, 1291, 1296, 1720, 1721, 1722; 84th Cong. Rec. 9881-7 (1939). Nor does the every day meaning of the word "employee" include the vice-president and general manager of a railroad."

The United States Court of Appeals for the Fifth Circuit reversed the District Court insofar as it had passed upon the merits, and held that the complaint stated no claim against Louisiana Southern Railway Company. (219 F. 2d 650.)

In the *Casey* case the District Court gave as its sole written reason for granting the defendant's motion for a summary judgment:

"REASONS:

"The record shows that plaintiff in order to accept an annuity under the Railroad Retirement Act, voluntarily in writing relinquished any rights he may have had to return to the service of defendant. 45 U.S.C. 228(b)."

The United States Court of Appeals for the Fifth Circuit reversed the District Court insofar as it had passed upon the merits, and, following its decision in *McDow v. Louisiana Southern Railway Company*, 219 F(2) 650, held:

"PER CURIAM:

"This appeal is ruled by the opinion and decision of this Court in McDow v. Louisiana Southern Railway Co., 219 F(2) 650,

Upon the considerations, and for the reasons, stated in that opinion, the complaint states no present claim, and the judgment is AFFIRMED."

In the *McDow* case, 219 F(2) 650, the Court of Appeal held:

"We do not think that the district court should have decided the merits of the question, because the Louisiana Southern Railway Company never was a party to the proceeding before the Interstate Commerce Commission, and is not bound thereby. The only pleading in that proceeding was the application filed by the New Orleans and Northeastern Rail-

road Company. The Louisiana Southern Railway Company was not made a party and did not appear. Pursuant to the authority granted by the Commission, the New Orleans and Northeastern Railroad Company acquired the majority of the stock of the Louisiana Southern Railway Company, but there still remain minority stockholders whose interests have in no way been represented before the Interstate Commerce Comimssion. The condition imposed by the Commission was imposed upon New Orleans and Northeastern Railroad Company, and not upon Louisiana Southern Railway Company.

It may be that McDow should mandamus the Commission to decide the question; or that, if he has a court remedy at present, it is by bill for declaratory judgment against New Orleans and Northeastern Railroad Company to determine the disputed question, and then, if decided favorably to him, by further petition to the Commission, but on the matter of what is his proper remedy we have no authority to pass and do not pass. We hold only that the complaint stated no claim against Louisiana Southern Railway Company upon which relief could be granted."

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the district court should not have decided the merits of the question.

2. In holding that the Louisiana Southern Railway Company was not bound by the order of the Interstate

Commere Commission, "because the Louisiana Southern Railway Company was never a party to the proceeding before the Interstate Commerce Commission, and is not bound thereby."

3. In holding that the minority stockholders of Louisiana Southern Railway Company had any interest which could have been protected by being represented in the proceeding before the Interstate Commerce Commission.

4. In holding that the condition imposed by the Commission was imposed upon New Orleans & Northeastern Railroad Company, and not upon Louisiana Southern Railway Company.

5. In not holding that the New Orleans & Northeastern Railroad Company, (which is admittedly bound by the order of the Commission) having acquired the control of the Louisiana Southern Railway Company and having caused said Louisiana Southern Railway Company to ivolate the order of the Commission, through the corporate action of Louisiana Southern Railway Company, the said Louisiana Southern Railway Company was bound by its corporate action and was subject to suit.

6. In holding that the petitioner was not suing under a contract of employment with the defendant, Louisiana Southern Railway Company.

7. In not passing upon the merits of the case.

REASONS FOR GRANTING THE WRIT.

These cases constitute the first and at present the only interpretation of the method of procedure to be followed by employees of consolidating railroads where the rights guaranteed to them by Congress in 49 U.S. Code 5(2) (f) are violated. These employees are not financially able to engage in expensive litigation with the railroads and if, as we believe, the procedure followed by the plaintiffs in these cases was correct, this Court should sanction it by reversing the Court of Appeals. But, in any event, this Court may well feel that it should set at rest the technical questions surrounding this remedial Act of Congress, so that employees whose rights are violated may have no difficulty in knowing how to proceed.

The effect of the Court's decision is to deprive petitioners of a right of action and a cause of action granted to them by the Act of Congress, 49 U.S.C.A. 5 (2) (f). The Act specifically provides that the Interstate Commerce Commission shall include in its order of consolidation "terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . . ." The order of the Commission applies to all parties to the consolidation, and is in accordance with the language of the statute, "carrier or carriers by railroad affected by such order. . . ." Just as soon as the Commission issued its order and the two carriers availed themselves of the permission granted by the Commission there was vested

in the petitioner a cause of action against the carrier in whose employ he was at the time of the order. Thereupon the court had jurisdiction. *Central New England Railway Company v. Boston & Albany Railroad Company*, 279 U.S. 415 at page 420.

It was mandatory upon the Interstate Commerce Commission to issue the order in question, which the Commission issued in the very language of the statute. Therefore the presence of the Louisiana Southern Railway Company, or its minority stockholders, in the proceeding before the Interstate Commerce Commission could not have affected the action of the Commission in following the statute.

The Court of Appeals was particularly in error in not holding that the New Orleans & Northeastern Railroad Company, (which is admittedly bound by the order of the Commission) having acquired the control of the Louisiana Southern Railway Company and having caused said Louisiana Southern Railway Company to violate the order of the Commission, through the corporate action of Louisiana Southren Railway Company, the said Louisiana Southern Railway Company was bound by its corporate action and was subject to suit.

A corporation acts by virtue of the decisions made by its officers elected by the majority stockholders. The New Orleans & Northeastern Railroad Company was the majority stockholder of Louisiana Southern Railway Company by virtue of the permission granted it to acquire the controlling stock of Louisiana Southern Railway Com-

pany. When it used its control of Louisiana Southern Railway Company to discharge the plaintiff, it was the New Orleans & Northeastern Railroad Company, bound by the order of the Commission and by the statute, which impelled the action of Louisiana Southern Railway Company, and certainly it cannot now hide behind the fact that its violation of the order of the Commission and of the statute was performed by it through the corporation, the control of which it had acquired, and which was the employer of the plaintiff. Being in the employ of Louisiana Southern Railway Company and not in that of New Orleans & Northeastern Railroad Company, the plaintiff was powerless to proceed against New Orleans & Northeastern Railroad Company as is suggested by the Court of Appeals.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DART, GUIDRY, PRICE & READ,
LOUIS C. GUIDRY,
Attorneys for Petitioners.

I, the undersigned attorney for Petitioner, certify that I have this day served a copy of the above and foregoing petition and brief on each of the opposing Attorneys of Record.

.....

LOUIS C. GUIDRY,
Attorney for Petitioner.

July ...., 1955.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

It is clear that the New Orleans and Northeastern Railroad Company, which applied for authority to acquire a majority of the stock of the Louisiana Southern Railway Company, was the only Railway before the Interstate Commerce Commission. It was granted permission to acquire such stock from various individual stockholders, subject to certain conditions, one of which each plaintiff claims gives him a right of action. Normally, violation of such condition would merely bear on the validity of

the acquisition for which permission is sought and granted. Plaintiffs contend it creates a right of action for damages. Without conceding that plaintiffs have safely leaped across this uncrossable chasm, but assuming they have, nothing in plaintiffs' petitions is found to support the novel proposition that a condition imposed on A may result in giving rise to a cause of action against B, a third party not even before the tribunal imposing the condition. As the Fifth Circuit Court of Appeals stated:

> **"The condition imposed by the Commission was imposed upon New Orleans and Northeastern Railroad Company, and not upon Louisiana Southern Railway Company."**

The only argument of counsel for petitioners is that his clients are poor[1] and that they need instruction as to how to proceed. It is certainly plain that any rights plaintiffs may have are against the New Orleans and Northeastern Railroad Company, not the Louisiana Southern Railway Company. There would appear no reason for the Supreme Court to waste its time in enunciating such a self-apparent proposition.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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[1] Not supported by the evidence in the transcript.